IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

PHIL BREDESEN, Governor of the State of Tennessee,	)	
Plaintiff/Appellee,	)	
v.	)	Case No. M2006-02722-SC-RDM-CV
	)	DAVIDSON CHANCERY
TENNESSEE JUDICIAL SELECTION COMMISSION,	)	06-2275(III)
Defendant,	)	
and	)	
J. HOUSTON GORDON and GEORGE T. LEWIS,	)	
Intervenors/Cross Claimants/ Appellants.	)	

REPLY BRIEF OF INTERVENOR LEWIS

JOHN S. HICKS (#010478)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
211 Commerce Street, Suite 1000
Nashville, Tennessee 37201
(615) 726-5600
(615) 726-0464 (Facsimile)

Counsel for Intervenor Lewis

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ARGUMENT

I. Plaintiff erroneously argues that the Tennessee Human Rights Act does not apply because the rejection of the first panel did not constitute employment-related discrimination.

A. Plaintiff does not contest Lewis' arguments regarding the THRA and does not provide any support for the trial court's ruling.

Plaintiff/Appellee's ("Plaintiff") brief to this Court is remarkable for what it does not argue. Although Plaintiff makes passing reference to the trial court's holding that the Tennessee Human Rights Act ("THRA") does not apply because Title VII does not apply to policy-making appointees, the bulk of Plaintiff's brief is devoted to an argument not addressed by the trial court – that the Governor's appointment to an interim vacancy does not create an employment relationship. There is no discussion in Plaintiff's brief which disputes Lewis' assertion that there are no individuals or categories of individuals who are excluded from the legislative purposes embodied in Tenn. Code Ann. § 4-21-101(a)(3) or (a)(8). Plaintiff does not dispute that there is no exclusion for appointees of any type or category. Plaintiff does not dispute that Tennessee courts have made it clear that the THRA employs different language from Title VII, is broader than the federal acts and that its interpretation is not limited by federal law. *Booker v. Boeing Co.*, 188 S.W.3d 639 (Tenn. 2006); *Arnett v. Domino's Pizza I, L.L.C.*, 124 S.W.3d 529 (Tenn. Ct. App. 2003). Plaintiff does not dispute that § 708 of Title VII itself provides that Title VII should not be interpreted to limit the reach of existing state laws or state laws enacted in the future. 42 U.S.C. § 2000e-7. Plaintiff's brief also omits any reference or discussion whatsoever to this Court's own Administrative Policy 2.02, which prohibits by its express terms discrimination based upon race against applicants for employment and applies to

all judicial branch employees including all state judges. Administrative Policy 2.02, §§ III, V.[1] Finally, Plaintiff's brief does not dispute that the rules and regulations of the Tennessee Human Rights Commission make it clear that if a federal guideline or regulation is inconsistent with the THRA, the THRA and appropriate regulations promulgated under the THRA shall govern.

It is fair to say, therefore, that Plaintiff's brief to this Court stops just short of abandoning the basis of the trial court's decision. Plaintiff's most recent attempt to avoid the application of the Act is, of course, completely at variance with the argument adopted by the trial court. In the trial court, Plaintiff argued that because the term "employee" was not defined in the Act, the trial court should simply import the definition of the term "employee" from Title VII. Now, Plaintiff has reversed field completely, arguing to this Court that because the term "employee" is not defined in the Act, this Court should adopt the "federal common law of agency." (Plaintiff's Brief, p. 27)

B. An interim appointee to this Court is an employee of the State of Tennessee, so the THRA applies.

It would perhaps come as a shock to the members of this Court to learn that they are not employees of the State of Tennessee. Plaintiff's position is that because interim appointees to this Court are later subject to a retention election, interim appointees to this Court are "employed" by the "electorate." (Plaintiff's Brief, p. 27) Vacancies on this Court are filled pursuant to the Tennessee Plan. Pursuant to the Tennessee Plan, the Governor selects the individual who will serve as a justice on this Court until the next

[1] Note the application of this Court's policy to all state judges even though all state judges are eventually subject to election.

statewide election, which in this case will occur in August 2008. *See Newman v. Voinovich*, 986 F.2d 159, 162 (6th Cir. 1993) (holding that with respect to the Ohio governor's interim judicial appointments, an "appointment" is merely a type of "hiring decision"). Actually, therefore, the "electorate" has no role to play with respect to the selection of the individual who will serve on this Court until the next statewide general election.

Members of this Court work in offices, libraries, and courtrooms provided by the State of Tennessee. This Court's staff attorneys, law clerks, and secretaries are employees of the State of Tennessee. This Court participates in a pension plan for Tennessee state employees and in a health insurance plan for Tennessee state employees who are employed by the Judicial Department. The spouses of state judges are even eligible for benefits under both plans. The compensation for the members of this Court comes from the State of Tennessee. An interim appointee's conduct is governed by the Tennessee Code of Judicial Conduct. An appointee may be disciplined by the Tennessee Court of the Judiciary or even removed by the General Assembly. TENN. CONST. art. VII, § 6. This Court publishes an Employee Policy Manual for all judicial department employees, including state judges. This Employee Policy Manual subjects judges to all manner of policies, including, for example, the travel reimbursement policy and sexual harassment policy. If the relationship between an interim appointee to this Court and the State of Tennessee is not an employment relationship, it is difficult to fathom how else the relationship could be characterized.

The Attorney General necessarily strains to avoid the clear purpose of the Act, the realities of the relationship, and the specific language chosen by our legislature. Tenn. Code Ann. § 4-21-101(a)(3) makes it clear that the THRA is designed to safeguard "all" individuals from discrimination. Tenn. Code Ann. § 4-21-102(3) defines "discriminatory practices" as "any direct or indirect act" or "practice of exclusion" or "preference in the treatment of a person or persons because of race." The definition of "discriminatory practices" makes no specific reference to employment. Tenn. Code Ann. § 4-21-306(a)(3) relates to admission to public accommodations, Tenn. Code Ann. § 4-21-311 provides for "additional remedies," Tenn. Code Ann. § 4-21-402 applies to labor organization practices, and Tenn. Code Ann. § 4-21-403 applies to employment agency practices. The express language of the statute, therefore, is not even limited to employment decisions made by employers.

In any event, as pointed out by the Judicial Selection Commission (the "Commission") in its brief to this Court, the most significant provision bearing upon this issue is perhaps Tenn. Code Ann. § 4-21-102(4), which provides:

> "Employer" means **the state, or any political or civil subdivision thereof,** and persons employing eight (8) or more persons within the state, **or any person acting as an agent of an employer, directly or indirectly**;

Id. (emphasis added.)

It is beyond argument that the State of Tennessee is an employer under the THRA. There is no person who more clearly acts as an agent for the State of Tennessee than the Governor of the State of Tennessee. Whether the Governor is negotiating the location of new industry within the state, or approving the settlement of litigation against the state, or

signing a contract with a vendor, or appointing members of boards and commissions, or hiring his office staff, or making an interim judicial appointment, the Governor, more clearly than any other person, acts as an agent, directly and indirectly, of the State of Tennessee. *See Walling v. American Needlecraft*, 139 F.2d 60 (6th Cir. 1943) (because the Fair Labor Standards Act expressly or by necessary implication includes certain workers, the court does not concern itself with the common law).

Consider the implications of Plaintiff's argument to this Court if taken to its logical extension. If the Attorney General correctly argues that there is no employment relationship involved whenever an interim appointee is subject to election because the true employer is the "electorate," any Governor would be free to discriminate on the basis of race without concern for the THRA with respect to all interim appointments to the Supreme Court, the Court of Appeals, the Court of Criminal Appeals, and all trial court judges, or any other interim appointment for which the appointee is later subject to a traditional election or retention election. The Attorney General's argument would also mean that mayors and county executives, county commissions, and city councils could violate the THRA and discriminate on the basis of race as long as their decision involved an interim appointment later subject to election. These decisions would include, for example, the filling of appointments to interim terms on city councils, county commissions, probate courts, juvenile courts, and road commissioners, to name a few. The Attorney General's argument would also bar the application of the THRA to appointments made by judges or local legislative bodies for positions such as Circuit Court clerk and Juvenile Court clerk, when they make interim appointments subject to the "electorate" selecting the clerk at the next available election. The Attorney General's

argument is profoundly at variance with the express purposes of the THRA and, as it relates to any Judicial Department employees, profoundly at variance with this Court's own Administrative Policy 2.02. Plaintiff's position is also profoundly at variance with the common-sense notion that, when a governor makes an interim appointment to a position within state government, that decision is an employment decision, plain and simple.

As the Commission's brief to this Court indicates, the Attorney General's argument also conflicts with this Court's opinion in *Sanders v. Lanier*, 968 S.W.2d 787 (Tenn. 1998). In *Sanders*, Judge Lanier was accused of demoting a county employee for refusing the judge's sexual advances. This Court held that the State of Tennessee was an employer under the Act, and that Judge Lanier allegedly acted, "directly or indirectly," as an agent of the State of Tennessee. 968 S.W.2d at 790. As the Commission's brief puts it.

> Thus, the fact that the Governor is not the employer is simply irrelevant. The state is the employer and the state acts through its agents. The Governor is the state's chief executive officer; in making judicial appointments, he acts under the direct authority given to him in the Tennessee Plan. If a circuit judge's actions against a county employee fall within the acts prohibited by Tenn. Code Ann. § 4-21-401(1), it is inescapable that the statute also prohibits the governor from refusing to consider a person for judicial office solely on the basis of race.

(Brief of Judicial Selection Commission at 3-4; Bredesen v. Tennessee Judicial Selection Comm'n, *et al.*, (No. M2006-02722-SC-ROM-CV).)

Note also, that on page four of this Court's opinion, there is a discussion of the state's vicarious liability which begins, "Our last inquiry is whether Judge Lanier was acting

within the scope of his employment." 968 S.W.2d at 790. Obviously, this Court found that Judge Lanier was a state employee as well as an agent of the state.

Plaintiff's reliance upon a Texas Court of Appeals case, *Thompson v. City of Austin*, 979 S.W.2d 676 (Texas Ct. App. 1998), is misplaced. It is difficult to tell whether *Thompson* is distinguishable or simply wrongly decided or both. Presently, the Texas Labor Code expressly defines the term "employee." Tex. Lab. Code § 21.002. The definition of the term "employee" is similar to the definition of "employee" found in Title VII. 42 U.S.C. § 2000e(f). Both the Texas Labor Code definition of "employee" and the Title VII definition of "employee" expressly exclude persons elected to public office, so the result in *Thompson* follows the definition.[2] See Appendix. The THRA has no definition of "employee," only "employer," and the THRA has no such exclusion. *See* Tenn. Code Ann. § 4-21-101 *et seq.* If, however, Plaintiff relies on *Thompson* for the proposition that an interim appointee to a government position, compensated by government, subject to removal and discipline by government, working in government buildings and relying upon government staff, is not an employee of government, then Lewis submits that *Thompson* is wrongly decided. This result conflicts with the THRA, the Tennessee Plan, this Court's Administrative Policy 2.02 and common sense.

Different states have made different policy choices regarding whether to exclude elected officials from the coverage of their anti-discrimination acts. For example, Arkansas defines "employee" but does not exclude elected officials. Ark. Code Ann.

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[2] The Texas act was first adopted in 1983. Section 21.002 was revised and amended in 1993 and again in 1995, but it is unclear whether those amendments related to the treatment of elected officials. *See* Tex. Lab. Code § 21.002. In any event, *Thompson* was decided in 1998. *See* 979 S.W.2d 676.

§ 16-123-102. Mississippi, on the other hand, excludes the state legislature, the Governor and his immediate staff, and all judges. Miss. Code Ann. § 25-9-107. North Carolina and Virginia, like Tennessee, do not exclude elected officials. N.C. Gen. Stat. § 126-16; Va. Code § 2.22639.B. Title VII, of course, like Texas and Mississippi, but unlike Arkansas, North Carolina and Virginia, specifically excludes elected officials.

Lewis submits that an interim appointee is not even an "elected" official until he has successfully stood for election. But even if an interim appointee is an elected official, the Tennessee legislature chose not to adopt a definition of "employee" which excludes either elected officials or policy-making appointees. This Court has consistently respected legislative choices by not reading into statutes provisions which are simply not there. *Abel's ex. rel. v. Genie Industries, Inc., et al.*, 202 S.W.3d 99 (Tenn. 2006); *Calloway v. Schucker*, 193 S.W.3d 509 (Tenn. 2005).

II. Plaintiff erroneously argues that the Equal Protection Rights of Gordon and Lewis were not violated when they were rejected because they are both Caucasian.

Plaintiff's equal protection argument, like his THRA argument, is significant for what it does not challenge. In his primary brief to this Court, Lewis asserted that racial classifications are presumptively invalid and are subject to strict scrutiny. (Brief of Intervenor Lewis ("Lewis' Brief") at 30-31, Bredesen v. Tennessee Judicial Selection Comm'n, *et al.* (No. M2006-02722-SC-ROM-CV)). Plaintiff has not challenged this proposition. Plaintiff also did not challenge the proposition that racial classifications, regardless of the facially benign motives of the government actor involved, must be subject to strict scrutiny. Plaintiff also does not make any serious attempt to suggest that

the Plaintiff's outright rejection of the remaining white nominees is consistent with the U.S. Supreme Court's decisions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *Gratz v. Bollinger*, 539 U.S. 270 (2003), and *Grutter v. Bollinger*, 539 U.S. 323 (2003). Plaintiff has not contested the constitutional proposition that the right to equal protection is an individual right or that Gordon and Lewis had a right to be considered holistically based upon all of their individual characteristics. Plaintiff has not offered any reason for the rejection of the first panel other than the race of its members.

Without record support, Plaintiff has asked this Court to take judicial notice of the "importance and sincerity of the governor's desire to consider diversity" and to take judicial notice that "the state is racially diverse" and that "all members of a heterogeneous society must have confidence in the openness and integrity of the legal system." (Brief of Appellee Phil Bredesen ("Plaintiff's Brief") at 35, Bredesen v. Tennessee Judicial Selection Comm'n, *et al.* (No. M2006-02722-SC-ROM-CV)). Moreover, Plaintiff has not disputed that the fact that the record in the trial court below is completely devoid of any evidence of any state interest, compelling or otherwise, which would justify the rejection of the first panel because both nominees are Caucasian. Plaintiff did not and cannot cite this Court to any testimony from lay witnesses or expert witnesses which would indicate that having a justice of any particular race would have any particular impact on the work of this Court. Likewise, there is no evidence in the record indicating that the outright rejection of two white nominees was narrowly tailored and necessary to achieve a compelling state interest, as strict scrutiny requires.

Instead of arguing that the rejection of the first panel based on its racial composition passed strict scrutiny under *Bakke, Grutter* and *Gratz*, Plaintiff attempts to persuade this Court that the analysis of *Bakke, Grutter* and *Gratz* does not apply. First, Plaintiff says that *Bakke, Grutter* and *Gratz* are "all cases striking down the admissions programs of certain public educational institutions that either specifically involve quotas, or that added points to the admission of scores of minority applicants." (Plaintiff's Brief at 31.) Of course, since this case challenges the rejection of the first panel based solely upon its racial composition and does not concern a future hypothetical appointment process which might consider race as a factor, the rejection in this case is clearly more mechanical and absolute than the quotas which were struck down in *Bakke* or the bonus points which were struck down in *Gratz*. *See* 539 U.S. 270; 438 U.S. 265.

Next, Plaintiff points out that, "This is a case involving the exercise of discretionary authority given by the legislature to the chief executive officer of the state to appoint constitutional officers, officers that are elected by and answerable only to the electorate of this state." (Plaintiff's Brief at 31.) First, interim appointees have never been elected at all. Second, the Supreme Court noted in *Bakke, Grutter* and *Gratz* that professional educators, themselves part of the executive branches of California and Michigan, were limited in their discretion when they embarked upon the classification of applicants based upon race. *See* 438 U.S. 265; 539 U.S. 323; 539 U.S. 279. Third, the Attorney General seems to argue, as he did with respect to the THRA, that because interim appointees to this Court are subsequently subject to a retention election, neither the THRA nor the Constitution restrains the Governor's interim appointment.

Based upon the sweeping language of the Equal Protection clause itself and its history, however, there is no reason that a nominee for an interim judicial appointment would lose his Equal Protection rights under either the U.S. or Tennessee Constitution simply because he may later be subject to election. Naturally, the Attorney General stops just short of suggesting that the Governor is above statutory or constitutional law. But Plaintiff's position, if taken to its logical extension, would mean that all nominees for interim appointments would lose their state and federal Equal Protection rights simply because they are later subject to election. In essence, the Attorney General's position is that because a nominee for an interim appointed office may lose that office in a retention election or traditional election, they may lawfully be excluded from that office because of unconstitutional racial classifications imposed by the appointing authority.

Significantly, the Governor's right to make interim appointments to this Court is not a right granted by the state constitution, but rather by the state legislature. Under Article V of the 1796 Constitution of the State of Tennessee, the legislature directed and established all superior and inferior courts of law and equity. TENN. CONST. art. V (1796) (attached hereto as Appendix). Under Article VI of the 1835 Constitution of the State of Tennessee, the judicial power of the State of Tennessee was specifically vested in the Supreme Court, and the General Assembly had the power to appoint judges of the courts of law and equity. TENN. CONST. art. VI, §§ 1-3 (1835) (attached hereto as Appendix). When our present Constitution was adopted, Article VI, § III, provided that the Supreme Court shall be elected by the qualified voters of the state. TENN. CONST. art. VI, § 3 (attached hereto as Appendix). Tennessee's Governor, therefore, has never had the constitutional right to fill interim judicial positions on this Court or any other court.

Therefore, no constitutional reason exists under principles of separation of powers or otherwise, for the Governor's statutory authority to make interim appointments to this Court to be free from constraint by statutes such as the THRA or for any Governor to be exempt from the Tennessee or United States Constitution.

Plaintiff also submits that he should prevail because

> Mr. Lewis does not cite to any case – nor has counsel for the Governor been able to find any case – where a federal or state court has held that the federal Constitution grants courts the authority to exercise judicial oversight over discretionary appointments by the governor of a state to a constitutional office such as justice of a state supreme court.

(Plaintiff's Brief at 32).

This Court could anticipate the response to this argument. Most cases over which this Court exercises jurisdiction are cases where there is no binding precedent directly on point. Otherwise, there would be no need for this Court to assume jurisdiction. It is unusual for an employer to state with such candor that "the reason," the only reason, for rejection of an applicant or applicants is their race. Moreover, it is unfortunate for the Attorney General to continue the mantra that there are no precedents on point when *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which was cited by the Attorney General and the trial court, clearly demonstrates that Missouri state judges who were elected were nevertheless covered by the Equal Protection clause. Although the challenge in *Gregory* was an age discrimination challenge to which a lower level of scrutiny was applied, there was never any intimation by the U.S. Supreme Court that the Equal Protection clause did not apply because Missouri judges were elected. *See id*. Moreover, *Bakke, Grutter* and

Gratz are all on point and all provide guidance on the measures which must not be taken in the interest of "diversity." *See* 438 U.S. 265; 539 U.S. 270; 539 U.S. 323.

Nothing argued by Plaintiff rebuts the fundamental Equal Protection analysis in Lewis' original brief to this Court. *Grutter* and *Gratz* make it clear that equal protection rights are individual rights. *See* 539 U.S. 244; 539 U.S. 306. If a state actor makes a decision adversely affecting an individual based upon a racial classification, that racial classification must be subjected to strict scrutiny. *Bakke* made it clear that racial classifications drawn in the interest of promoting racial diversity must still be subjected to strict scrutiny. *See* 438 U.S. 265. Plaintiff has failed to cite this Court to any proof in the record that the rejection of two Caucasians on the first panel served any interest of the State of Tennessee. No such proof exists. Since the U.S. Supreme Court's decision in *Bakke*, and continuing through *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995), *Grutter* and *Gratz*, the motive of the state actor has been of no consequence. *See* 488 U.S. 469; 515 U.S. 200; 539 U.S. 244; 539 U.S. 306. And in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1996) (plurality), the "role model" justification was likewise rejected. There was never any effort made by Plaintiff to recruit minority applicants. Plaintiff did not reject the all white panel he was sent in 2005 or appoint the minority nominee he was sent in April of 2006. Individualized, holistic consideration requires more than an outright rejection of two qualified white nominees six days after they were nominated without so much as an interview.

CONCLUSION

Based upon the provisions of the Tennessee Human Rights Act, the United States Constitution and the Tennessee Constitution, Lewis respectfully requests that this Court hold that the rejection of the first panel solely because its remaining nominees are Caucasian was unlawful and that the duty of the Governor is to fill the remaining vacancy on this Court from the names sent him on the first panel.[3]

[3] Plaintiff also did not dispute the appropriateness of Lewis' proposed remedy in the event that this Court finds the rejection unlawful on any grounds.

Respectfully submitted,

/s/ John S. Hicks
JOHN S. HICKS (#010478)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
211 Commerce Street, Suite 1000
Nashville, Tennessee 37201
(615) 726-5600
(615) 726-0464 (Facsimile)

Counsel for Intervenor Lewis

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by the means indicated this 26th day of January, 2007, to:

Robert E. Cooper, Jr.,
Attorney General and Reporter
and
Janet M. Kleinfelter, Senior Counsel
425 Fifth Avenue North
Nashville, Tennessee 37243
(via e-mail/U.S. Mail)

Ben H. Cantrell
Tune, Entrekin & White
AmSouth Center, Suite 1700
315 Deaderick Street
Nashville, Tennessee 37238
(via e-mail/U.S. Mail)

Charles W. Bone, Esq.
Charles Robert Bone, Esq.
Bone McAllester & Norton, PLLC
511 Union Street, Suite 1600
Nashville, Tennessee 37219
(via e-mail/U.S. Mail)

Lyle Reid, Esq.
Post Office Box 198
Brownsville, Tennessee 38012
(via facsimile/U.S. Mail)

Irma Merrill Stratton, Esq.
2121 One Commerce Square
Memphis, Tennessee 38103
(via e-mail/U.S. Mail)

Timothy W. Smith, Esq.
2670 Union Extended, Suite 1200
Memphis, Tennessee 38112
(via e-mail/U.S. Mail)

/s/ John S. Hicks
John S. Hicks